No. 10287

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually, and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

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TOPICAL INDEX.

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REPLY BRIEF OF APPELLANTS.

We have carefully examined the Answering Brief of Appellee, United States Fidelity and Guaranty Company, and we believe that in all probability it would be unnecessary to reply thereto at all, since we respectfully submit that appellee has totally failed to answer and meet the propositions presented in our Opening Brief, but out of an abundance of precaution we shall answer one or two matters suggested in appellee's brief.

Reply to Appellee's Point I.

As we understand appellee's discussion under this heading, it contends that a very liberal construction should be given to Lloyd's bond, since it was a fidelity bond, and by this discussion attempts to single out only Lloyd's bond, wholly ignoring the fact that U. S. F. & G.'s bond was also a fidelity bond, and that the action here was not against Lloyd's alone, but was against both Lloyd's and U. S. F. & G., and the transactions are wholly and completely interwoven one with the other.

We pointed out under Point V, beginning at page 38 of our Opening Brief, that the real controversy was not between Fruit Growers and the two bonding companies, but was in fact a controversy between U. S. F. & G. and Lloyd's, and that as a consequence rules of construction which have been applied between an assured and an insurance company, would have no application here.

We have no quarrel with the authorities cited in appellee's brief upon this subject, but do not consider them applicable, but if they are applicable it does not change the situation, since the Court is not here concerned with the applicability of those rules only as to Lloyd's, but they must be applied with equal force to the bond of U. S. F. & G., and when they are applied with equal force, as we have stated in our Opening Brief, the burden certainly will fall more heavily upon U. S. F. & G. than it will upon Lloyd's. In other words, the Court must take all of these documents and the facts and circumstances in relation thereto, and consider them as a whole, and not merely single out Lloyd's bond as the only one to be

construed or considered. When this is done it will be seen that U. S. F. & G.'s superseded suretyship rider must be construed as having been intended by the parties to have some force and effect, and the only force and effect it could have, would be existent if Lloyd's bond is construed in the manner contended for by appellant, or in other words, if it is construed exactly in the manner in which the language contained therein requires it to be construed.

At page 11 appellee states that Lloyd's is contending that Clause 5 should be broken up, so as to render utterly devoid of any meaning and purpose whatsoever the "Main Clause" mentioned in our brief at page 32.

Either we have failed to clearly express ourselves, or appellee has failed to carefully examine our contention, as set forth in the brief. For that reason we have reread it, and believe that it is clear, when carefully examined, that we are not under any circumstances contending that the language of the "Main Clause" is wholly devoid of any meaning.

We have not contended and do not now contend that any of the language contained in Clause 5 was wholly meaningless. We thought we had made it clear that we contend that every bit of it had meaning and effect, and that although portions may, under certain circumstances, become inoperative by reason of the absence of a Discovery Clause in the Primary Bond, this does not render any portion of the clause utterly invalid and meaningless, but if the Court should construe the clause in the manner contended for by U. S. F. & G., it would render a portion of the language utterly meaningless and useless.

Reply to Heading, "The Grammatical Construction Contended for by Lloyd's Is Not Tenable."

Under this heading appellee argues that Lloyd's, by the very language of their bond, recognize that there was a period after the non-renewal of their bond, within which losses occurring during its currency, may be discovered, and become "claimable under this Insurance," and state in substance that Lloyd's, at the time they framed their own Discovery Clause, so framed it as to make it meaningless and so that there could be no liability on Lloyd's for losses incurred during its currency, but not discovered during such currency.

While this subject is quite fully covered in our Opening Brief we might pause to mention the fact that what Lloyd's meant, must be determined by the language of their bond, and the same rule must apply to U. S. F. & G.'s bond, and as we have pointed out in our Opening Brief, U. S. F. & G.'s own bond contained a similar clause, which would make its Discovery Clause meaningless insofar as the excess bonds were concerned, and it is perfectly obvious that both Lloyd's and U. S. F. & G.'s form is designed to fit any circumstances which may arise, and that uniform clauses are printed in the bonds, so as to make them applicable under any circumstances.

Certainly it does not lie in the mouth of U. S. F. & G. to suggest anything to the contrary, when their own bond contained a similar provision, which we have printed in our Opening Brief, when they caused such a clause to be inserted, with full knowledge of each and all of the terms of the Primary Bond, which bond they themselves had written.

Appellee follows this by assuming that which is not in evidence, and presents a speculative argument upon what Lloyd's would have said if inquiry were made as to the meaning of its terms and conditions, which argument of course is not supported by any authorities or any principle or rule of law or construction.

Reply to Heading "As to Appellants' Contention of Contemporaneous Construction."

Appellee first assumes that which is not correct, by stating that appellant's argument under Subdivision II was evidently based upon the fact that the superseded suretyship rider attached to the 1937 bond, was placed thereon some time after the bond was issued.

It is true that we did make the statement that it was placed thereon at a later date, but our argument is not based entirely upon that proposition. It would have mattered not, whether it was placed thereon at the very time the original bond was written, or at a subsequent date. Our purpose in inviting the Court's attention to the fact that it was placed thereon at a subsequent date. fortifies the inference that an additional premium was charged for such superseded suretyship rider. If the rider had been placed on there in the first instance we do not doubt but what U. S. F. & G. would claim, although such claim might be untenable, that this was just a customary rider placed on all such surety bonds, and thus attempt to weaken its significance, but even if it had been placed there at the time the bond was originally written, the Court would have no right to indulge in the belief that it was merely a part of the customary procedure, and would, we submit, have to presume that it was not intended as a useless act.

What we did say, and what we do contend, is, that in order to hold Lloyd's liable in this case, it is necessary to say that U. S. F. & G. and Fruit Growers performed a useless and meaningless act, by attaching to the bond which was written, a superseded suretyship rider for which U. S. F. & G. charged a premium, although that document could never have any effect whatsoever.

We challenged U. S. F. & G. to answer our argument under Point II, and to explain the purpose of such rider, and its acts in connection therewith, and we respectfully submit that they have totally failed to meet this challenge.

They state:

> "From whatever angle the matter is to be approached, it amounts to nothing more than that for the period during which there was no rider on the bond, United States Fidelity and Guaranty Company had not bound itself to assume any liability for losses occurring during the currency of Lloyd's policy, no matter when they were discovered, and that after the affixing of the rider, it did assume the limited liability for such losses as were discovered after the expiration of the period of discovery provided in Lloyd's policy."

This argument on appellee's part is exactly in accordance with the contention made by these appellants.

They now admit, in their brief, that they assumed a liability by the superseded suretyship rider, for losses discovered after the expiration of the period of discovery in Lloyd's bond.

Now, since their bond was only effective for one year, and consequently the superseded suretyship rider attached thereto could only be effective for one year, it is obvious that if what appellee says is true, the judgment must be reversed as to Lloyd's, for the only way they could assume any liability under that particular bond, for losses occurring during the currency of Lloyd's bond, would be if Lloyd's had no liability for any losses which occurred subsequent to its expiry date, and as we have stated, if your Honorable Court construes Lloyd's bond as creating a liability for discoveries made up to three years from its expiry date, then U. S. F. & G. assumed no liability of any kind or nature by virtue of its superseded suretyship rider.

We are of course indebted to U. S. F. & G. for their admission in this particular, since it seems to be decisive of the question which we have presented, and must of necessity, if followed, result in a reversal of the action as against Lloyd's.

Reply to Points Under Heading "The Construction of Lloyd's Policy Contended for by Appellants Is Untenable and Not Supported by Any Authorities."

Under this heading, at page 31, appellee says that we have requested the Court to construe paragraph 5 so as to reject and hold meaningless all of that clause or provision, except so much thereof as reads:

> "Warranted free of all claims for losses occurring subsequent to the expiry date of this Policy and for losses not discovered within its currency."

This is not exactly true; that is to say, we do not ask the Court to hold the balance of that clause meaningless and to reject it. What we do say is, that it is merely inoperative. It had a meaning and purpose, but its operative force depended upon the existence of a Discovery Clause in the primary bond, and since there was an absence thereof the clause never became operative, or as we have said, it is analogous to a constitutional provision which is not self-executing, but which requires an act of the Legislature to make it operative. Under such circumstances the constitutional provision is not meaningless, and need not be rejected. It merely remains inoperative.

Appellee cites *Hartford Acc. & Ind. Co. v. Swedish Methodist Assn.,* 92 Fed. (2d) 649, at 651, and quotes a clause from it, stating that the contentions made by Lloyd's in the instant case, were made by Hartford in that case.

This is not a correct statement of the decision, as will be seen even by a cursory examination of it.

In that case there was involved purely the construction of two bonds which contained superseded suretyship riders. The Court concerned itself with trying to construe the superseded suretyship rider, and did use the language which is quoted on page 34 of appellee's brief. No clause of the kind or nature written by Lloyd's, and which is under consideration here, was in anywise involved in that case. However, there was involved a superseded suretyship rider containing similar language as that of U. S. F. & G.'s rider, which is involved here, and it was in relation to that clause that the Court was speaking in the quoted language.

Appellee further argues that appellants concede that the entire Clause 5 of its bond should be construed together, and in the same breath seek to divide that clause into subdivisions in such a manner as to utterly read out of it all of its substance and to destroy the provision entirely, when if it was intended to be construed as now contended for, it would have been very easy to have said so in language which could not have been misunderstood.

We submit that this statement is not correct, and that the language is clear and definite, and that we can conceive of no reason why appellee cannot understand it, since it is couched in fixed and definite language, and conforms exactly to the rules of grammar which are uniformly recognized, and as we have stated, we do not ask that any part of the clause be destroyed. We merely request the Court to hold that it means what it says.

Conclusion.

We respectfully submit that there has been a total failure on the part of appellee to answer the contentions set forth in Lloyd's opening brief; that the judgment as to Lloyd's should be reversed, and the Lower Court directed to enter judgment against U. S. F. & G. for the full amount of $22,019.22, together with interest thereon from the date the judgment herein was entered.

Respectfully submitted,

CHAS. E. R. FULCHER,

Attorney for Appellants.